IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 11617 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE M.S.SHAH
and
HON'BLE MR.JUSTICE A.M.KAPADIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

MAHENDRA PETROCHEMICALS LTD

Versus

UNION OF INDIA THRO' SECRETARY

Appearance:

1. Special Civil Application No. 11617 of 2003
MR PARESH M DAVE for Petitioner No. 1-2
MR DN PATEL for Respondents

CORAM : HON'BLE MR.JUSTICE M.S.SHAH
and
HON'BLE MR.JUSTICE A.M.KAPADIA
Date of decision: 13/01/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE M.S.SHAH)

Rule. Mr DN Patel, learned Senior Standing Counsel for the Union of India waives service of Rule for the respondents.

2. In this petition under Article 226 of the

Constitution, the petitioners have challenged the orders dated 14.5.2003/14.6.2003 passed by the Settlement Commission rejecting the four applications filed by the petitioners under Section 127-B of the Customs Act, 1962 (hereinafter referred to as "the Customs Act").

3. The petitioner-Company is a Public Limited Company engaged in the business of manufacture of polyester yarns. The petitioner-Company was also exporting the goods manufactured by it and against the exports, the petitioners were availing the benefit of the Advance Licence Scheme as contained under the Exim Policy of the Government of India. The petitioners obtained Advance Licence dated 15.9.1998 from the Office of the Joint Director General of Foreign Trade, Ahmedabad entitling the petitioners to import 2,62,500 Kgs. of chips and other inputs. The export obligation of the petitioners against the above import was prescribed under the said licence at 2,50,000 Kgs. of yarn valuing US$ 3,12,500. The petitioners thereafter imported the chips under the above licence and filed Bill of Entry dated 14/15.9.1998 for clearance of the imported goods for home consumption. The petitioners showed additional customs duty (CVD) as payable whereas the basic customs duty and special additional duty (SAD) were shown as Nil in the Bill of Entry for the goods imported and cleared for home consumption. It is case of the petitioners that after the above import took place in the year 1998 and immediately after the inputs were removed for home consumption, international prices of yarns became very volatile. As a result of various developments that took place in various countries, mainly South East Asian countries and also countries like China and Taiwan, imported polyester yarn became very cheap to such an extent that the yarns sold by the manufacturers located in countries like China and Taiwan became cheaper than even the price at which the petitioners had imported the chips. The petitioners, therefore, were not in a position to export yarns manufactured by it out of the above referred inputs namely chips. The petitioners, therefore, disposed of the materials in the domestic market and did not export any yarn against the obligations flowing from the above referred advance licence. The petitioners had executed bond and bank guarantees as prescribed under the Exim Policy for the above imports. As the petitioners could not export the goods after importing the above referred materials, by letters dated 14.2.2001, the Deputy Commissioner of Customs, Mumbai invoking the bank guarantees for non-discharge of export obligation. Those letters are produced at Annexure "B" colly. to the petition. The

Customs department accordingly encashed the bank guarantees against the petitioners' liabilities for customs duty. The Office of the Director General of Foreign Trade, Ahmedabad issued demand notices dated 12.10.2001 advising the petitioners to pay the Customs Department customs duty on the unutilized imported materials alongwith interest at 24% p.a. thereon and called upon the petitioners to explain why the bank guarantees should (sic - not) be enforced also declaring the petitioners as defaulter thereby disentitling the petitioners to secure any licence/release order in terms of para 71 of the Import Policy 92-97 and in accordance with the Foreign Trade (Development and Regulation) Act, 1992 (hereinafter referred to as "the Foreign Trade Act") and the Rules and orders issued thereunder. After calling upon the petitioners to remain present for personal hearing before the Deputy Director General of Foreign Trade on 30.10.2001 at 3.00 PM, the notices concluded with the following paragraph :-

"This Demand Notice (is) issued without prejudice to any other action which may be taken against you under the Foreign Trade (Development and Regulation) Act, 1992, the rules and orders issued thereunder."

Four such separate notices were issued against the petitioners on 12.10.2001 and they are produced at Annexure "A" Colly. to the petition. The petitioners thereafter moved the Settlement Commission under Section 127-B of the Customs Act. The Settlement Commission, however, rejected all the four applications on the ground that no show cause notice is issued by the Proper Officer who has to be a Customs Officer in terms of Section 2(34) of the Customs Act, 1961 and that the Officers of the Director General of Foreign Trade are not proper officers for the purposes of the Customs Act. Hence, the demand notices issued by the Office of the Director General of Foreign Trade cannot be said to satisfy the provisions of Section 127-B(1)(a) of the Customs Act. The Settlement Commission accordingly sent the cases back to the Revenue to dispose of the cases in accordance with the Customs Act as if no application under Section 127-B had been made by the petitioners. The said orders of the Settlement Commission are challenged in the present petition.

4. Mr Paresh M Dave, learned counsel for the petitioners has submitted that the Settlement Commission has erred in refusing to exercise the jurisdiction vested in it by giving erroneous finding that the letters dated

14.2.2001 written by the Deputy Commissioner of Customs calling upon the Bank for encashment of the bank guarantees were not show cause notices or demand notices issued by the Proper Officer under the Customs Act. Mr Dave has also submitted that in any view of the matter, the applications under Section 127-B can be made for settlement of any proceeding under the Customs Act or any other Act for the for the levy, assessment and collection of customs duty, which may be pending before a Proper Officer or the Central Government on the date on which an application under Section 127B(1) is made. It is, therefore, submitted that the proceedings need not necessarily be proceedings under the Customs Act, but they may be proceedings under any other Act if the proceedings are concerned with levy, assessment and collection of customs duty. Since the demand notices dated 12.10.2001 specifically advise the petitioners to pay to the Customs Department the customs duty, the demand notices have to be treated as demand notices issued by a Proper Officer.

At this stage, we may also record the statement made by Mr Paresh M Dave for the petitioners that no proceedings are instituted for prosecution in respect of the contents of the notices dated 12.10.2001 (Annexure "A" colly.) to the petition. We may also refer to the statement made in the reply affidavit that the petitioners are liable to pay customs duty amounting to Rs.65,82,370-39 and interest amount of Rs.38,72,582/and the department has recovered Rs.53,94,914/= by encashing the bank guarantees furnished by the petitioners at the time of registration of the licences.

5. On the other hand, Mr DN Patel, learned Senior Standing Counsel for the Central Government has supported the order of the Settlement Commission and has relied on the affidavit-in-reply dated 7.10.2003 filed by Mr Rajendra Kumar Bansal, Assistant Commissioner of Customs, Bombay. It is stated in the affidavit, inter alia, that after importing the chips and other material, the petitioners failed to export the resultant product as required under DEEC scheme to fulfill the export obligation within the export obligation period mentioned in the advance licence. Therefore, the petitioners were liable to pay customs duty amounting to Rs.65,82,370.39 and interest amount of Rs.38,72,582/-. Accordingly, the bank guarantees for Rs.53,94,914/- furnished by the petitioners at the time of registration of the licences were encashed by the department and the amount was deposited in the treasury.

It is also contended in the reply affidavit that the Joint Director General of Foreign Trade had issued demand notices under the provisions of Import Policy and Foreign Trade (Development & Regulation) Act, 1992 and that the action initiated by the Joint Director General of Foreign Trade under the aforesaid provisions is independent and separate from the action initiated by the Deputy Commissioner of Customs under the provisions of the Customs Act. Hence, such cases cannot be taken up by the Settlement Commission since their jurisdiction is in respect of matters where the importer has not made a full and proper disclosure of his duty liability before the Proper Officer.

Mr Patel has, therefore, submitted that since no show cause notice was issued to the petitioners by the Customs Department, the applications filed before the Settlement Commission were not maintainable under Section 127B(1)(B)(a) of the Customs Act.

6. Before considering the rival submissions, it is necessary to refer to the relevant statutory provisions. Chapter XVIA of the Customs Act begins with the heading "Settlement of Cases". Section 127A contains definitions including definitions of "case" and "Settlement Commission" which are as under :-

"Section 127A. Definitions.- In this Chapter, unless the context otherwise requires,-

(b) "case" means any proceeding under this Act or any other Act for the levy, assessment and collection of customs duty, or any proceeding by way of appeal or revision in connection with such levy, assessment or collection, which may be pending before a proper officer or the Central Government on the date on which an application under sub-section (1) of section 127B is made :

Provided that ... ...

(f) "Settlement Commission" means the Customs and Central Excise Settlement Commission constituted under section 32 of the Central Excise Act, 1944 (1 of 1944).

Section 127B in so far as is relevant for the purposes of the present controversy reads as under :-

Section 127B. Application for settlement of

cases.- (1) Any importer, exporter or any other person (hereinafter referred to as the applicant in this Chapter) may, at any stage of a case relating to him make an application in such form and in such manner as may be specified by rules, and containing a full and true disclosure of his duty liability which has not been disclosed before the proper officer, the manner in which such liability has been incurred, the additional amount of customs duty accepted to be payable by him and such other particulars as may be specified by rules including the particulars of such dutiable goods in respect of which he admits short levy on account of misclassification or otherwise of goods, to the Settlement Commission to have the case settled and such application shall be disposed of in the manner hereinafter provided :

Provided that no such application shall be made unless -

(a) the applicant has filed a bill of entry, or a shipping bill, in respect of import or export of goods, as the case may be, and in relation to such Bill of entry or shipping bill as show cause notice has been issued to him by the proper officer.

(b) the additional amount of duty accepted by the applicant in his application exceeds two lakh rupees.

Since the controversy has arisen on account of interpretation of the expression "a proper officer", it is necessary to refer to the provision of Section 2(34) of the Customs Act which reads as under :-

(34) "proper officer", in relation to any functions to be performed under this Act, means the officer of customs who is assigned those functions by the Board or the Commissioner of Customs.

Section 32 of the Central Excise Act, 1944 provides for constitution of the Customs and Central Excise Settlement Commission for the settlement of cases under Chapter V of the Central Excise Act and Chapter XIVA of the Customs Act.

Section 31(c) of the Central Excise Act also

defines "case" in the same terms as Section 127A(b) of the Customs Act i.e. any proceeding under the Excise Act or any other Act for the levy, assessment and collection of excise duty, or any proceeding by way of appeal or revision in connection with such levy, assessment or collection, which may be pending before a Central Excise Officer or Central Government on the date on which an application under sub-section (1) of section 32E is made.

It is thus clear that for an application before the Settlement Commission under Section 127B to be competent, it is not necessary that the proceeding must be under the Customs Act. The definition of "case" expressly includes "any proceeding under any other Act" if such proceeding is for levy, assessment and collection of duty. It is true that the demand notices dated 12.10.2001 are issued by the Foreign Trade Development Officer for Joint Director General of Foreign Trade and they also call upon the petitioners to explain why the petitioners should not be declared as defaulter thereby disentitling the petitioners to secure any licence/release order in terms of para 71 of the Import Policy and in accordance with the Foreign Trade Act, but the same demand notices also advise the petitioners to pay the customs duty on the unutilized imported materials alongwith interest at 24% p.a. thereon. The concluding paragraph of the demand notices also makes the intention of the issuing authority clear that it was not a mere show cause notice for action under the Foreign Trade Act and the Import Policy, but it was also a demand notice for demanding customs duty and the said notices were issued "without prejudice to any other action which may be taken against the petitioners under the Foreign Trade Act, the rules and orders issued thereunder.

The words in Section 127A(b) "any proceeding under any other Act for the levy, assessment and collection of customs duty" would become redundant if the contention of the learned Senior Standing Counsel were to be accepted that only the officers under the Customs Act can be said to be the proper officers as defined by Section 2(34) of the Customs Act. If this were the legislative intent, the Legislature would not have covered "any proceeding under any other Act for the levy, assessment and collection of customs duty" within the definition of "case" for which the application may be made to the Settlement Commission.

7. Mr Patel, learned Senior Standing Counsel has made an attempt to save the situation by submitting that "any other Act for levy, assessment and collection of

customs duty" would mean an Act like the Customs Tariff Act, but not the Foreign Trade Act.

It is, therefore, necessary to make a reference to the provisions of the Foreign Trade (Development and Regulation) Act, 1992. Section 5 of the Act provides that the Central Government may, from time to time, formulate and announce, by notification in the Official Gazette, the export and import policy and may also, in like manner, amend that policy. Sections 7 to 9 provide for the procedure for making any import or export, a detailed procedure is to be specified by the Director General under the Import Export Policy. The exports can be made in accordance with the Policy and where a license is required to be obtained, the licensee has to comply with the terms and conditions of the licence.

There is no dispute about the fact that one of the terms and conditions of the licence is that if the licensee has imported any material for the purpose of manufacturing goods ultimately to be exported, customs duty would not be payable if the imported raw materials are used in manufacturing finished products which are exported.

8. It is in view of the aforesaid statutory provisions and the conditions of the licence that the Joint Director General of Foreign Trade issued the demand notices dated 12.10.2001 advising the petitioners to pay to the Customs Department customs duty on the unutilized imported materials alongwith interest thereon. If the Joint Director General of Foreign Trade is not treated as the proper officer for the levy, assessment and collection of customs duty and if the letters dated 14.2.2001 (Annexure "B" colly.) written by the Deputy Commissioner of Customs calling upon the Bank for encashment of the bank guarantee are not treated as show cause notices or demand notices from the proper officer for the purpose of levy, assessment and collection of customs duty, there would be no outstanding demand from the Customs department to the petitioner, which is not the case of the respondent authorities.

The term "proper officer" has to be read in conjunction with the definition of "case" which includes proceeding under the Customs Act as well as under any other Act. Since the Import Policy framed under Section 5 of the Foreign Trade Act and Sections 7 to 9 of the Said Act also provide for issuance of licence, which enables the licence holder to avail of exemption from payment of customs duty on import of materials to be used

as raw materials for manufacturing finished products to be exported, it has to be held that the officer under the Foreign Trade Act is also a proper officer concerned with the collection of customs duty.

9. In view of the above discussion, we are of the view that the demand notices dated 12.10.2001 issued by the Joint Director General of Foreign Trade (Annexure "A" colly.) read with the letters dated 14.2.2001 of the Deputy Commissioner of Customs for encashment of the bank guarantees are to be treated as proceedings covered by the definition of "case" as defined in Section 127B and, therefore, the applications made by the petitioners under Section 127B for settlement of proceedings are maintainable.

While the Settlement Commission has the power to settle the case in respect of interest, penalty and prosecution, there is no power conferred for waiver of customs duty. Hence, the petitioner shall have to pay the balance amount of customs duty of Rs.11,87,456-39 ps. (Rs.65,82,370-39 ps. less Rs.53,94,914/- received by encashment of bank guarantees).

10. We accordingly direct that if the petitioners pay the aforesaid differential amount of Rs.11,87,456-39 ps. to the Customs Department within one month from today, then the Settlement Commission shall entertain the petitioners' applications for settlement of case under Section 127B of the Customs Act which were earlier rejected by its orders dated 14.5.2003/14.6.2003.

Mr Dave for the petitioners states that the petitioners shall pay the differential amount of customs duty within one month from today.

11. Accordingly, the petition is allowed. Subject to the condition that petitioners pay the Customs Department the customs duty of Rs.11,87,456-39 ps., the impugned orders dated 14.5.2003/14.6.2003 (Annexure "E" colly.) passed by the Settlement Commission under the Central Excise Act, 1944 are hereby quashed and set aside and the Settlement Commission is directed to entertain the petitioners' applications under Section 127-B on merits.

It is clarified that this Court does not express any opinion on merits of the question about the petitioners' liability to pay interest, fine and/or penalty and the Settlement Commission shall decide the applications in accordance with law after following the procedure prescribed in the Act, and by proceeding on the

basis that the notices dated 12.10.2001 (Annexure "A" colly.) issued by the Foreign Trade Development Officer for Joint Director General of Foreign Trade and the letters dated 14.2.2001 of the Deputy Commissioner of Customs, Mumbai pertain to demand of Customs Duty and, therefore, the notices shall be treated as notices issued by the proper officer contemplated by Section 127-B of the Act.

We make it clear that we are not expressing any opinion either on the question of interest, penalty to be levied on the customs duty and prosecution or on the question of disentitlement of any licence/release order, in terms of para 71 of the Import Policy 92-97 as mentioned in the show cause notices.

Rule is made absolute to the aforesaid extent.

(M.S. Shah, J.)

(A.M. Kapadia, J.)

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